

November 18, 2011

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Suzanne Murphy, General Counsel
Les Chisholm, Division Chief
Public Employment Relations Board
1031 - 18th Street
Sacramento, CA 95811-4124

Re: PERB's implementation of AB 646

Dear Ms. Murphy and Mr. Chisholm,

Thank you for the opportunity to provide input regarding PERB's efforts to implement AB 646. The confusion created by this poorly drafted piece of legislation is palpable and makes implementation for all parties, including PERB, difficult. We hope that the California Legislature will quickly draft clarifying legislation so that the parties may focus their time and resources on resolving negotiations disputes rather than speculating on and/or litigating confusing legislative provisions.

Attached please find suggested language regarding potential regulations on the factfinding process. We encourage PERB to maintain its practice of focusing regulations on the procedural aspects of practice before the agency, while allowing the adjudicatory process to be used to determine substantive points of law.

As noted in the materials submitted by the law firms of Burke Williams & Sorensen (management) and Leonard Carder (labor), we think it is essential that there be some reasonable time period in which a labor organization has to request factfinding following the use of mediation. To do otherwise, would be inconsistent with the statutory goal of timely resolution of bargaining disputes (See Govt. Code § 3505). We do not agree, however, with BWS, Leonard Carder or PERB's November 14 staff discussion draft, that an exclusive representative has a right to request factfinding even if mediation is not used. The statute, as drafted, does not so state and, in the absence of a clearer indication of statutory intent through clean-up legislation, we think it would be unwise for PERB to speculate as to the Legislature's intent.

We agree with Leonard Carder's suggestion that PERB Regulation 32603 should be clarified such that a public agency's failure to exercise good faith in MMBA-required impasse procedures would be an unfair practice. In fairness, the same process should apply for labor organizations, and so we have included it in proposed Regulation 32604.

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We look forward to working with you and the Board regarding the implementation of this new legislation.

If you have any questions regarding the above please do not hesitate to contact us.

Very truly yours,

LIEBERT CASSIDY WHITMORE

A handwritten signature in black ink that reads "Bruce A. Barsook". The signature is written in a cursive, slightly stylized font.

Bruce A. Barsook

BAB:tp

Enclosure

cc: Partners, Liebert Cassidy Whitmore

32802 Submission of Negotiations Disputes to a Factfinding Panel under MMBA

(a)(1) Not sooner than 30 days after the appointment or selection of a mediator, pursuant either to the parties' agreement or a process required by a public agency's local rules, an exclusive representative may request that the parties' differences be submitted to a factfinding panel, if:

- [a] The parties have failed to reach an agreement;
- [b] The exclusive representative submits a written request to proceed to factfinding to the public agency and to PERB within 40 days after the appointment or selection of a mediator; and
- [c] The request is accompanied by evidence of the date that the mediator was appointed or selected.

(2) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(b) The Board shall, within five (5) working days from the date the exclusive representative submits its request for factfinding, notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a) above, no factfinding panel will be appointed and no further action will be taken by the Board.

(c) For purposes of this section only, "working days" shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(d) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

32803 Appointment of Person to Chair Factfinding Panel under MMBA

(a) Within five days after the request for factfinding is submitted pursuant to section 32802, the parties will notify the Board of their selection of panel members for the factfinding panel.

(b) Within five days of the selection of the panel members by the parties, the Board will notify the parties that it will select and appoint the chairperson unless notified by the parties that they have agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. The Board will submit seven names to the parties, drawn from the list of factfinders established pursuant to Government Code section 3541.3(d). The Board will, by random selection, designate one of the seven persons to serve as the chairperson unless the parties, by alternate strike or other methodology of their choice, select one of the seven persons or someone else to serve as chairperson.

32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the submission of a request for factfinding

32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(c) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.